On the Doctrine of Constructive Total Loss. *By* MANLEY HOPKINS, Esq., *Average-Adjuster.*

IT would be very difficult to select a more simple idea, couched in more simple terms, than that conveyed by the expression 'Total Loss.' It would not be easy to find an idea which has wandered farther from its radical, and has *by development* undergone greater transformations than that of 'Total Loss,' according to the doctrine as now expounded.

Total loss is the privation of a thing that was in possession. It is, as regards its subject, the annihilation of a relative object.

Rights must have their definition in language, and language is liable to change; the primitive meaning of words is soon altered or enlarged. It is a vain attempt in any language to hold one word to one thing for a continuance. In the arts this is attempted to a certain extent, and the result is, that each art comes to have a technical vocabulary, understood only by those who engage in that art, or by those who study that vocabulary—useless, or nearly so, to the rest of the world.

More usually secondary meanings take the place of, or are made co-ordinate with, their originals. Words, like the first roads in a country, are formed straight and separate; they answer their purpose for a while: then necessity cuts other roads parallel with or diverging from these, till at last great ways, lanes, and paths make a network over the face of the land—convenient but intricate, useful but apt to mislead—easy to err in.

It seems needful to recall such truisms, when we are about to consider so startling a conversion of terms as is contained in the present subject; where we speak of that as lost which remains in place and *in specie*, and call that a *total* loss when the greater portion of the object remains in possession.

The difficulty about terms was sought to be removed by the introduction of a reconciling adjective. *Constructive* was added to the name of *total loss*, and the whole represents a theory which, though somewhat at variance with common sense, now obtains generally, and affects the practice of settlement on policies. Yet should the explanation of a Constructive Total Loss be made for the first time to an ordinary thinker, he might probaby be struck with an antithesis, and conclude that, as extremes meet, a *con*structive loss is the antipodes of a *de*structive one.

The total loss of an object insured, and here the primitive meaning of the words is intended, forms the most simple and legitimate claim on a policy. Whether a vessel founders on the high seas, and sinks, or strikes on rocks, and is beaten piecemeal by the waves, or is consumed by fire, or, in fact, perishes from any of those causes against which underwriters guarantee an indemnity to the assured, the result is the same, and a loss in full must be paid by the insurers. But ere long, cases would arise in which an insured owner would seek to be relieved from the strict letter of his contract, and an extension of its meaning would be sought. An instance would soon be found where the absoluteness of the loss of the ship could not be proved. A vessel is missing: the time for its arrival is overpast; doubts of its safety increase to suspicion that some accident has befallen it; and as time elapses, the probability of its loss grows into an almost certainty. Here, whilst there is only negative

evidence of loss, it is reasonable that such proof should be accepted; and the custom became established, that according to different distinctions of ships, corresponding periods of time in which no intelligence was obtained concerning them were made tantamount to absolute proof of their destruction.

And again; a vessel may be pirated by her commander and crew: the crime affects the insurers under the head of barratry. Here, in fact, no more destruction may have happened to the ship than that she has been carried to a port not intended by her owner, or has been diverted from a certain path across the ocean to traverse other paths; nevertheless, in reference to the insurers, this is a total loss, because, although the presumption may be strong that the ship still exists *in statu quo*, yet she is irrecoverable, and therefore lost. And notwithstanding that the insurers have no part in appointing the master, a person in whom their interests are so materially concerned, yet all the consequences of the bad conduct of that person are assumed by them, and such barratrous abstraction of ship or of goods was also included in the category of total loss.

Thus actual proof, and absolute destruction, were waived in some cases when a total loss was claimed: in other words, insurers paid for the total loss of an object which probably existed unimpaired, or of which no proof of destruction could be produced.

Still, although the wall by which an insurer's liability was limited, was thus somewhat broken down, such cases as the two just cited did not affect the reasonableness of the system. There was an absence of the property insured, and this absence or deficiency came near to the original idea of a loss. But soon other extensions of meaning began to creep through the breach. "When we speak of a total loss," says Justice Parke in his learned work on insurance, "we do not always mean to signify that the property insured is irrecoverably lost or gone; but that by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and so much injured as to justify him in abandoning it to the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened." And our courts of law give us frequent proofs by their judgments that combinations of circumstances may arise, their first causes being in perils for which the insurers hold themselves liable, amounting to something as disadvantageous to the assured as if his ship were entirely lost. Such circumstances are to be construed into total loss; and thus, capture by enemies, excessive damage by storms or by stranding, have been fruitful grounds for *Constructive Total Losses.* It has been decided too, that the *species* of a thing remaining is not an answer to a claim for total loss if all use of that thing be lost through the perils to which it has been exposed.

This is not an unreasonable doctrine: it is but another instance of "development"—the expanding of a primary idea. It is sanctioned by law, it is admitted in practice; nevertheless its tendencies may be dangerous, and the unfolding germ requires limits to its growth. We have to provide ourselves, therefore, with measures to ascertain at what point an accumulation of deteriorating circumstances is to be held equivalent to an entire loss, and what degree of change of condition amounts to a loss of use.

The expenses of restoring what has been destroyed, and of repairing what has been injured, about a ship, are the most common form of a ship's constructive death. The difficulties of carrying on repairs, or of procuring

materials for those repairs, the inability of raising means to pay the necessary disbursements arising in a foreign port, or the exorbitant rate of interest demanded for money required for such disbursements, are the usual proximate causes which lead to an abandonment of the ship to her insurers. The rules which courts of law in this country have laid down to determine in such cases the question of *total loss* or *not total loss* appear to be these: that if the expenses of repairing a damaged ship should exceed the value of that ship after being repaired, she may rightly be abandoned to the insurers as totally lost. Again: what would be the course of a reasonable man uninsured under similar circumstances? as, whether he would proceed to repair his vessel, and continue his voyage, knowing the expenses that must be incurred, and the difficulties which must be overcome in doing so, or whether he would voluntarily abandon his adventure by selling the ship—whatever course the jury finds would be pursued by him, is to be conclusive as to the insurer's liability for a total loss.

But while definite rules of law are thus fixed, the difficulty of applying them remains. Each case must rest on its own merits: the entire circumstances are alike in scarcely any two instances; the evidence is *ex parte*, and often incomplete; and it is frequently as difficult to ascertain the correctness of the test, as it is to decide on the result when the test is applied.

But the difficulties do not end here. It has hitherto been taken for granted that the primary causes leading to the Constructive Total Loss are those acknowledged by the insurer as affecting him. In many cases, however, it is a combination of causes which leads to the result; and of these mixed causes some are of a nature that do not affect the insurer's responsibility, and, consequently, in which he ought not to be concerned about the event: for a ship may die a natural death; she may be so weak from sheer old age as to be no longer able to contend with ordinary winds and seas; she may sink from rat-holes, or perish through natural defects. These causes, resulting in total loss, are not among the perils taken upon himself by the underwriter; and they ought no more to affect his insurance than if he had not underwritten the policy. Still he is at a disadvantage: and should a ship sink at sea, and the insurer resist paying a total loss on the grounds of unseaworthiness, or natural defect, the *onus* of proof lies on him to show the ground of resistance—a thing generally difficult or impossible to do, inasmuch as the ship's "memorial has perished with" her. Should it happen that from such causes a vessel is forced into a port of refuge, and she is there abandoned, and constructively totally lost, the insurer might escape by producing evidence of the cause of her loss: but let it happen that two or many causes conspire to eventuate the constructive loss of a ship, some of them being perils undertaken by insurers, and others for which they are not liable, here the logical inference would be that the insurer's loss is limited to the amount that can be shown to proceed from circumstances of which he takes the risk; but practically it occurs that the *whole result* of such mixed causes is cast upon him, the owner abandoning the ship to him, and claiming a total loss.

The case of the 'Broxbornebury,' tried in the Court of Common Pleas, is very much in point; and I cannot help considering that the verdict given therein afforded a dangerous precedent in establishing the principle that where several causes concur in producing the abandonment of a ship, and her consequent sale, insurers are liable to the full amount of their policy with benefit of salvage, although one or more of the causes which led to the

condemnation were of a nature that the underwriters never undertook to insure against.

The 'Broxbornebury' was built in the year 1812. In 1839 she was purchased at auction by a ship-builder, and was put into a state of efficient repair, under the direction and supervision of Surveyors to Lloyd's Register Book. In 1841 she returned to England from a foreign voyage, when she was again surveyed, repaired, and was continued on her class of "red dipthong." On her subsequent voyage she experienced a violent hurricane, and was carried into Mauritius; she was there surveyed, when her sternpost was found to be badly started, the bowsprit beam sprung, the upper works seriously damaged, and the vessel leaking badly. The surveyors also found evident signs of decay in the ends of the timbers, so that on putting their hands into the air-holes they brought out handsful of rotten wood. One surveyor expressed himself that the ship was "as rotten as a pear." They ordered the copper to be stripped off, and the ship repaired. Before proceeding with these repairs, however, estimates were procured from shipwrights of the cost of effecting them. They amounted to 40,000 dollars and upwards, equal to about £8,000. To this would have to be added bottomry premium, and some other charges. Upon the ground of the great expenses necessary for repairing the vessel, she was condemned, and was broken up. The owners claimed for a total loss on their policy, which was resisted, and the insurers paid into court 50 per cent. on the vessel's value, in full of all claims on themselves for repairs and expenses. They brought evidence to prove that all the damages set forth in the documents, for which they were responsible, could have been effected at Mauritius for about £2,000, and in England for a less sum. The policy contained a clause admitting the seaworthiness of the ship at the inception of the risk, and the defendants did not seek to impugn the fact of her seaworthiness. The learned Judge, in directing the jury, told them that the ship's seaworthiness at the time of the hurricane was admitted; that the law stood, that if the expenses of repairing a ship exceeded her value after repairs, it amounted to a total loss, and they must find for the plaintiffs. The evidence on the part of the owner had been, that the value would have been less than those repairs, and the jury found accordingly.

The special clause in the policy, admitting the seaworthiness of the ship, did not affect the general issue: it was an unnecessary and ill-advised addition, and it has since been expunged from the printed policy of one of the Companies; but no attempt was made to gain a verdict on the plea of the ship having been unseaworthy when the risk began. In this way, indeed, it may have had a negative effect, by shutting up one branch of the defence: for, in other words, the policy could not have been vacated on such a ground, as other policies may be, even were the fact of unseaworthiness demonstrable; but the clause did not extend farther to the insurers' disadvantage, and convert that into a claim against them which was no claim against other underwriters, or make them responsible for inherent defects and natural decay, first discovered when a view was taken of those injuries sustained at sea for which they admitted their liability. But to repair and replace the damages done by sea perils, so as to put the vessel into the exact condition she was in previous to the hurricane, is one thing; to restore her to a perfectly sound, stout, and seaworthy state, is another. In the former process, insurers stand by the terms of their agreement, and indemnify for those losses which they

engage to make good: by the second they would do far more; they would be putting the vessel into a better and more efficient state than that in which she had previously been; they would be rebuilding the frame, restoring a time-destroyed constitution, and presenting rejuvenescence to the veteran ship, that for upwards of thirty years had traversed the waters of the ocean.

No discredit need be attempted to be cast on the truth of the estimate. It is possible that the sum named, or even a greater sum, might have been requisite at Port Louis to put in new timbers, to sheathe the vessel with new copper, and to perform every other repair that was desirable before she could be emphatically pronounced seaworthy. This is not the point; for the real question is, to what extent are the insurers interested in that sum: and farther, how are they affected if the alternative of selling the ship in her then state be chosen in preference to entering upon expenses so great and extravagant?

Whatever a prudent, uninsured shipowner would do, such is the rule laid down to be the course adopted by an insured owner; and no exception could be taken to the reasonableness of this rule as conclusive against the underwriters, supposing, what is not the case in this instance, *all* those expenses to have taken their rise from the sea perils encountered by the vessel, and which the underwriters insured the owner against. But how different is the action of the rule when insurers are *not* liable for all the damages requiring to be repaired—how different is it when they are avowedly not concerned in causes which had a very material part in procuring the condemnation and sale of the ship—how different is it to pay for consequences which are brought on ourselves purely by our own conduct or stipulations, and consequences which arise from the behaviour of others, never guaranteed by us, or from conditions the *onus* of which we never took upon our own shoulders!

This leads us to notice an expression which is, indeed, the same as was uttered by the Judge in the 'Roxelaine's' case, and from which, in the unqualified sense in which it was spoken, we must dissent. Serjeant (now Lord Chancellor) Wilde said, "I can distinguish no difference whatever between an absolute total loss and the case where expenses would exceed the value of the vessel when repaired, called a Constructive Total Loss." We confess we see differences, and those material, between the two cases.

When a vessel is lost by sinking or by fire, no doubts can be entertained of the fact; and although in many cases her destruction may be attributable to unsoundness, and other causes not touching insurers, yet the proofs being lost, the question cannot be mooted. Not so, however, when expenses are built up till they reach the entire value of the thing insured; because in the latter case, the separate members and materials of this consuming expense may be defined, and some of them may be such for which insurers are liable; some may be notoriously the reverse. So, without denying that the thing is constructively destroyed, the work of destruction may be shown to have been carried on by two or more hostile forces, and the exact proportions of their action may be distributed to each of such powers. The expenses *in cumulo* are indeed tantamount to the loss of the subject matter *in specie, but they are not, necessarily, tantamount to a total loss as regards the insurers.* If certain perils undertaken by underwriters operate to one-fourth of the whole process of destruction, underwriters are certainly bound to that degree.

If other defects operate to destroy the remaining three-fourths of the value, are owners to cast off the *onus* of such operation, and to say, "true, three-fourths of these mixed causes are attributable to us, and only one-fourth to you; nevertheless we abandon the concern to you, and we claim the total value, the same as if the whole four-fourths of loss proceeded from the risks you insured us against by your policy"?

It cannot be urged as strictly true what is sometimes said, that in a valid case of loss it is indifferent to an owner whether the insurer completely restore the vessel to her pristine state, or pay him the amount insured. Even here there is a difference, which an owner will soon perceive, in favour of the total loss. If the ship be repaired, at whatever cost, one-third is deducted from those repairs by the underwriters, and is paid by the owner on the score of amelioration to his property; whilst in paying a total loss no deduction is made for deterioration which the ship may have undergone before she was destroyed: and although something might be said on this subject, the custom is a settled and convenient one, and both parties to the contract are perfectly agreed about the state of things as it exists. But if owners, or captains who act on behalf of owners, were permitted, in cases of damage at foreign ports, the option of repairing or selling their ships, the advantages to the owners attending the latter alternative are so well known that the course would constantly be adopted—it being proverbial amongst shipmasters, that next to a good voyage, a good loss is most acceptable to their owners. With Fire Insurance Companies, the option remains with the office of rebuilding or of paying the amount of insurance; and they select the way most economical to themselves, which can never be injurious to the assured if he be not over-insured, and wishes to make an unfair profit out of the accident. That no such profit should accrue to the indemnified party in Marine Insurances is consistent with the Rhodian dictum, *Nemo debet locupletari alienâ jacturâ.*

In the case of the 'Sea Horse' the insurers successfully resisted the claim for total loss; but as there were other strong grounds which weighed with the jury in their decision, it need not be cited here.

In the thoroughly argued cause of the 'Alfred,' tried in 1848 before Lord Chief Justice Wilde, great stress was laid by the counsel for the defence on the large sum that had been insured on the ship, and on the freights, and on the temptation it offered for a master to ingratiate himself with his owner, by procuring a condemnation and sale of his vessel, by which so great and such immediate advantages would be obtained. For had the ship been repaired and the voyage completed, she would probably have been worth only one-half the sum at which she was valued in the policy; besides, by a loss, the owner comes into possession of his money without the trouble of transferring property in the usual manner. The whole case is very instructive, and embodies in itself the law up to the present time. There, it is clearly laid down not only that the absence of *bona fides* in the master and those concerned in the condemnation and sale of a ship is fatal at once to a claim on the insurers for loss, but moreover, that beyond everything being done *optimâ fide*, it must be shown to the jury that the best judgment had been formed which the circumstances admitted, and which men of prudence and ordinary intelligence could have arrived at. It is true, indeed, that such men may, with all their discretion, judge erroneously as to results, but such erroneous judgment, if it were the best they could form as disinterested

and prudent persons, is not to defeat the owner's claim in his insurance. A verdict was given by the jury in favour of the defendants—the insurers, both as regarded the loss of ship and freight. There is a considerable advantage in a loss on freight. The law allows the insurable interest on this species of subject matter to be the gross amount, although it is certain that a vessel completing her voyage in the usual way can only yield to her owners a *net* sum, *i.e.*, a sum given by the proprietors of goods for carriage of their merchandise, diminished by various expenses incidental to the working of the ship, such as wages and victualling of the crew, port charges, &c.; so that the interruption of a voyage at any point must be more profitable than the completion of that voyage, inasmuch as underwriters make no deductions on account of these expenses, but pay the sum insured. A loss on a freight policy is therefore an absolute gain to the shipowner.

It will be gathered from what has been said, that insurers are exposed not only to the "Act of God," "King's Enemies," and so on, but beyond these to risks arising from human volition; voluntary actions of men, who, while they may desire to do justly and honestly, labour under a bias from which they can scarcely free themselves. Very much should all parties concerned remember what Lord Mansfield said in the analogous case of a claim for total loss on goods: "The merchant cannot elect to turn that which, at the time it happened, was in its nature but a partial, into a total loss, by abandoning." —(Goss and Another *v.* Withers.) And still greater caution needs to be exercised with a certain class of insurances, in which an owner insures against *total loss only*. Here clearly it is *aut Cæsar aut nullus*, and there is every inducement to a dishonest owner to make the worst of any accident which may happen to his vessel, and there is a strong reason why the judgment of an honest owner should be distorted. We should not forget the words of Justice Bayley, in Gardiner *v.* Salvador: "It must always be remembered that there is no such head of insurance law as 'loss by sale.'" To which Serjeant Shee, after quoting these words, says, "That which in its own nature is not a total loss, cannot be converted into one by any act of the master."

Yet the subject does not rest here; and I think it most important to be observed, that, with all the conditions fulfilled that justify a sale of a ship, the question will arise in legal phrase — Is the insurer concluded in a total loss in consequence of such a sale? To which I answer, not always. I have previously spoken of those mixed causes which operate in the destruction of a vessel, and which, in certain cases, render it imperative to dispose of her at a foreign port. Now it may happen that all those conditions were observed, viz., a real necessity for resorting to a port of distress; real damage to the ship; a difficulty of doing repairs; the difficulty or impossibility of raising money for the disbursements; *bona fides* on the part of the captain; prudence and intelligence both in him and the surveyors and tradesmen who examine the damages, and estimate the necessary repairs; a correct judgment, even, that the vessel was irreparable; the sale of the ship;—and yet, after all, the claim against the underwriters may not be for a total loss, but for a partial one, for it is very possible that sea damage, age, rot, and other causes may combine, so that as a remedy for all a sale may be the most judicious course that can be adopted. But a sale, whilst it removes difficulties, the greater part of which from their nature appertain to the owners, and do not apply to the insurers, ought not to saddle them with a

responsibility far heavier than the owners incur. It may be that out of the whole real and probable expenses, one-fourth is all in which underwriters are concerned; yet by an abandonment and sale, those parties to whom the remaining three-fourths of the damnifying causes belong, seek to throw the *onus* of the whole on the insurers, and themselves escape scot-free.

A sale then is not conclusive, and distributive justice must decide in what proportions the loss is to fall upon assured and insurers. Tolerably exact estimates and calculations can be made from documentary evidence as to the amount of damage for which the underwriter is responsible, and the claim upon him as a *quasi* "particular average," just as if the ship had been repaired. The master's duty to the insurers "is no other than the duty of an honest servant of an honest employer to those with whom that employer has contracted. Whether he proceeds to a sale or gives orders for repairs, he should carefully ascertain the amount of damage resulting from recent perils of the sea, and of damage attributable to other and older causes, preserving for the satisfaction of all whose interests may be affected by his acts, the evidence which will enable them also to distinguish the one from the other, and thereby adjust their respective losses."—(Abbot on Merchant Ships and Seamen. By Serjeant Shee.)